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IN THE  
United States Court of Appeals  
FOR THE NINTH CIRCUIT

EDWIN WALTER DUNLAP,  
*Appellant,*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

No. 22,600 ✓

CARLTON COZZETTE PEAK,  
*Appellant,*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

No. 22,600-A

On Appeal From the Judgment of  
The United States District Court  
For the District of Arizona

BRIEF FOR APPELLEE

EDWARD E. DAVIS  
United States Attorney  
For the District of Arizona

JO ANN D. DIAMOS  
Assistant United States Attorney  
*Attorneys for Appellee*

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Assistant United States Attorney  
Attorneys for Appellee

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## II

### ISSUES OF THE CASE

1. Was the issue of search and seizure of the two vehicles waived?
2. If not waived, was there probable cause for the search of the Triumph?
3. Was there probable cause for the arrest of Peak?
4. Was there sufficient evidence for the conviction of both appellants?

## III

### JURISDICTIONAL STATEMENT OF FACTS

This case was begun in the United States District Court for the District of Arizona by the return of an Indictment by the Federal Grand Jury sitting at Tucson, Arizona, on September 13, 1966, charging in three counts, Edwin Walter Dunlap, Appellant herein, Richard Wayne Howard and Carlton Cozzette Peak, Appellant herein. (Transcript of Record, Volume I, pages 4 through 7. Hereinafter the first volume of the Transcript of Record will be referred to as "RC" and the Transcript of Testimony will be referred to as "RT" and the number following "RC" and "RT" will refer to the page and the number following "L" will refer to the line. Appellant Edwin Walter Dunlap will be referred to as Dunlap or Appellant Dunlap. Appellant Carlton Cozzette Peak will be referred to as Peak or Appellant Peak. Richard Wayne Howard will be referred to as Howard. Both Peak and Dunlap have filed separate appeals, but since they were tried together and have raised the same issues, the Government pursuant to Rule 28 (i), Federal Rules of Appellate Procedure, Title 28, U.S.C., is filing one reply brief.)

The Indictment charged in Count I a conspiracy commenc-



ing August 30, 1966 and continuing thereafter until on or about August 31, 1966, in the District of Arizona at Nogales, Arizona, and elsewhere between Dunlap, Richard Wayne Howard and Peak, and various other persons whose names were unknown to the Grand Jurors, to violate Sections 173, 174 and 176a of Title 21, United States Code, and that it was a part of the conspiracy that the defendants would fraudulently and knowingly smuggle and bring into the United States of America from and through Mexico three and three-fourths ( $3\frac{3}{4}$ ) ounces of heroin and twenty-nine (29) pounds of marijuana, contrary to law; and that it was a further part of the conspiracy that they would wilfully and knowingly receive, conceal, buy and sell and facilitate the transportation, concealment and sale of three and three-fourth ( $3\frac{3}{4}$ ) ounces of heroin and twenty-nine (29) pounds of marijuana, after the said heroin and marijuana had been smuggled and brought into the United States of America, contrary to law.

The Indictment charged, in Count II, Dunlap with a substantive violation of 21 U.S.C. §176a, of smuggling 29 pounds of marijuana.

The Indictment charged in Count III, Peak and Howard with a substantive violation of 21 U.S.C. §174, of smuggling three and three-fourths ( $3\frac{3}{4}$ ) ounces of heroin (RC 6-7).

On September 26, 1966, Dunlap, Howard and Peak appeared in person and by their counsel, C. V. Worrell, Sr., and pleaded not guilty (RC 72).

On November 10, 1966, the Government filed a motion for trial setting (RC 9).

On November 23, 1966, Dunlap and Howard filed a waiver of their presence for the hearing of the motion (RC 11, 12), and the Court, on the representation of Government's counsel that April 11, 1967, was a date agreeable to defendants, set the case for April 11, 1967 (RC 72).

On March 21, 1967, all three, Dunlap, Howard and Peak, filed a Motion to Continue trial (RC 13, and an affidavit in support of the motion (RC 15-16).

On March 23, 1967, the Government filed its opposition to the Motion to continue trial (RC 18).

On March 27, 1967, a substitution of Harvey E. Byron for C. V. Worrell as attorney for Peak was filed (RC 19, 20).

On March 27, 1967, no appearance was made by the defendants or counsel, except Harold Warnock appeared for Harvey Byron, the Motion to continue was heard and denied (RC 74), and on March 29, 1967, a copy of the Minute Entry of the Order denying the continuance was mailed to all counsel (RC 74).

On April 10, 1967, a motion for continuance was again filed (RC 22), and on the same date was heard and granted (RC 74).

On April 20, 1967, the case was reset for trial on September 19, 1967, at 9:30 a.m. (RC 74), and on April 25, 1967, a notice of the trial setting was mailed to all counsel (RC 74).

On September 19, 1967, Howard failed to appear for trial (RC 74), Dunlap and Peak waived trial by jury (RC 27-28).

On September 19, 1967, trial commenced as to Dunlap and Peak before the United States District Judge James A. Walsh, sitting without a jury and on September 20, 1967, trial was completed (RC 74).

The Court found Dunlap and Peak guilty as charged in Count I, Dunlap guilty as charged in Count II and Peak guilty as charged in Count III (RT 241, L 3-9).

On October 5, 1967, Peak filed a motion for new trial (RC 73, 31-35).



On October 12, 1967, the Government filed its Memorandum in Opposition to Peak's Motion for New Trial (RC 73, 26).

After several continuances, judgment as to Dunlap was entered on October 30, 1967, and Dunlap was sentenced to five years on Counts I and II, sentences to run concurrently (RC 38).

On October 30, 1967, judgment was entered as to Peak, and Peak was sentenced to 7½ years on Counts I and III, sentences to run concurrently (RC 40).

On October 30, 1967, Dunlap and Peak both filed Notices of Appeal (RC 44, 58).

Bail on appeal for Dunlap was fixed at \$5,000 (RC 47, 48) and for Peak at \$10,000 (RC 59).

On October 31, 1967, Dunlap posted bond (RC 60-63).

On November 2, 1967, Peak posted bond (RC 68-71).

On April 17, 1968, the Trial Court entered an Order granting leave to Dunlap and Peak to prosecute appeal in forma pauperis.

The Trial Court had jurisdiction for the trial of the offense by the provisions of 18 U.S.C. §3231. This Court has jurisdiction of the appeal by the provisions of 28 U.S.C. §1291.

### **Statement of Facts**

On August 30, 1966, at about 9:00 a.m., Customs Port Investigator, Everett H. Turner, Customs Agents Henry H. Washington and James B. Anderson were in the Coronado Motel Coffee Shop, which is located on Grande Avenue, State Highway 89, in Nogales, Arizona, about one to one and one-half miles north of the International Border (RT 12-13; 88; 122). Their attention was caught by Howard and Peak who

were seated at another table (RT 12). Turner's attention was drawn to them because their clothes were disheveled and they were unshaven, and since there were only four families of colored people, they were immediately noticeable as strangers (RT 51).

Turner and Washington saw Howard get up from the table in the direction of the pay phone; Howard stayed there about 3 to 5 minutes and on returning to the table, Howard raised his right hand, touched his forefinger to his thumb with the other three fingers upraised, "an OK sign" (RT 13-14; 123).

Shortly thereafter the Agents left, but Turner returned and checked with the Coronado Motel manager and was shown Government's exhibit 1—Howard's motel registration in the name of Carl Anderson (RT 14; 122). The manager, Joe Crevolone, pointed out a 1965 Buick Riviera coupe, white in color with California plates (RT 14).

Turner returned to the office and ran a record check on the license plate (RT 15). Turner returned to the Motel and was shown Government's exhibit 6 (RT 72) and had a black 1965 Triumph pointed out to him (RT 15). Turner then ran a license check on the Triumph (RT 15, L 20).

Shortly thereafter, Turner set up a surveillance across the street from the Coronado in the Colonial House parking lot (RT 15, L 22-25).

From approximately 11:00 a.m. to noon, Turner remained there until he moved into room number 6 at the Coronado, joining Agents Anderson and Washington there (RT 16, L 3-10).

Anderson observed Dunlap leave his room about 3:00 p.m., walk back and forth several times and re-enter his room (RT 91).

Around 4:00 p.m. Peak and Howard left their motel room and entered the Buick and drove off. Turner followed them into Mexico where they had parked the Buick near Elvira's Restaurant, near the International Fence in Mexico (RT 16). Peak and Howard were at the opposite end of the block talking to a taxi driver for about five minutes (RT 16). They appeared to enter the restaurant and were there one-half hour (RT 16).

Peak and Howard then entered the Buick and then drove south approximately a mile and a half, near the bull ring (RT 17). The Buick was parked and Howard and Peak were seated in a car parked immediately behind it talking to Roberto Sanchez, a known narcotics dealer in Nogales, Sonora, Mexico (RT 17).

Turner returned to the port of entry and saw Peak and Howard re-enter the United States in the Buick about three hours later at 8:00 p.m. (RT 17).

Inspector Charles Bigelow took Peak and Howard's entry (RT 144). They declared liquor (RT 144).

Peak and Howard returned to the Motel and presumably entered their room (RT 17). Shortly thereafter Dunlap left his room and entered Peak and Howard's room (RT 93).

Anderson then left the motel and went and obtained another car which was unmarked but had a radio in it under the dashboard (RT 93). Peak and Howard came out, walked around, and Howard looked into the Government car and then returned to the miniature golf course at the motel (RT 94).

At approximately 10:30 p.m., Howard left in the Buick, followed by Agent Anderson (RT 17).

Howard drove south on Grande to Plum Street, turned left off Plum Street to Encina, and then left on Walnut and stopped in the middle of the block (RT 94). At this point, Anderson

discontinued surveillance and returned to the motel room (RT 94).

At about 11:00 p.m. Dunlap removed two suitcases from room number 7 and walked over to Peak and Howard's room and set the suitcases on the front porch (RT 94, L 24 to 95, L 4).

At about 12:00 to 12:45, Dunlap and Peak left in the Triumph (RT 17; 95) with Dunlap driving (RT 94). Anderson followed them south on Grande to Crawford, which is two blocks north of the Border (RT 94), and then went to the end of Crawford, made a U-turn and at that point discontinued the surveillance (RT 95) because there were too few cars on the street (RT 113, L 2-4). Anderson returned to the room (RT 95).

Turner, who was watching Morley and Grande Avenues from the V.F.W. parking lot, and Anderson from the room, saw the Triumph return first and then the Buick returned at about 1:00 a.m. (RT 18; 95).

At about 1:30 a.m., Peak and Howard left in the Triumph and no agent followed it (RT 18; 95).

At about 2:00 a.m. they returned and Peak and Howard got out of the car, opened the trunk and removed something white from it (RT 18).

Dunlap then started putting things in the Triumph and left headed north (RT 18) at a pretty good rate of speed (RT 168, L 1-3). Turner radioed Agents Washington and Cameron (RT 18). Washington had been in communication with Turner and Anderson all day (RT 124, L 5-12). Cameron joined him around 7:00 p.m. (RT 124, L 3-4).

Washington used his siren and red-light to stop Dunlap (RT 125, L 23-24). Cameron informed him they were Federal Agents, advised him as to his rights, and that they were

going to search the car for contraband, and if they found any contraband in his car that he would be placed under arrest (RT 166). Washington searched the car and found in the trunk two gunny sacks or burlap bags, Government's exhibits 7 and 8 (RT 127-128).

(Both Howard and Dunlap's attorneys stipulated chain of custody for Exhibit 7 and 8, as well as Exhibit 3, and that Exhibit 3 contained the heroin, 3.37 ounces, 66.6% pure, that exhibit 7 and 8 contained 20 bricks of marijuana which weighed a total of 29 pounds, RT 147-149. They stipulated further that Exhibit 3 was the substance Anderson took from the Buick, RT 148, L 11-19, as testified to by Anderson, RT 97, L 1-20. Exhibit 3 was wrapped in a wet towel and was inside exhibit 2, RT 98. Also found in exhibit 2 was a loaded .45 automatic pistol, and Howard's billfold, RT 98, L 22-23. Exhibits 7 and 8 were wet, RT 127, L 15.)

Washington radioed Turner he was waking up the Commissioner to obtain a warrant for the arrest of Howard and Peak, and a search warrant for the Buick (RT 140-141; 19). He never executed the warrant because the Buick started to leave with Howard and Peak at about 4:00 a.m. and Turner and Anderson stopped them and arrested them for smuggling and conspiracy on the marijuana (RT 121, L 6-9). Anderson found Government's exhibit 2, the blue Pan-American flight bag containing Government's Exhibit 3, the 3.35 ounces of heroin, on the right front floor board (RT 20-21), the passenger side, where Peak was seated (RT 81, L 7-8). Howard was the driver (RT 81, L 9-10). Binoculars were found on the back seat floor board (RT 81, L 11-14).

Wet clothing, pants, socks and shoes, were also found on the back floorboard (RT 81, L 24 to 82, L 1). On the evening of August 30 and the early morning of August 31, 1966, the vicinity of the International Boundary was wet with standing water (RT 99, L 15-20).



The Government rested (RT 168, L 22 to 169, L 4).

Dunlap testified he had a football scholarship to the University of New Mexico, obtained by his brother-in-law, Howard (RT 186-187).

Prior to leaving Los Angeles for the University, his brother-in-law offered to meet him in Nogales with some young ladies to have a party (RT 187).

Dunlap arrived at the motel, registered, went to his room called his brother-in-law who was asleep (RT 188). Dunlap went to sleep and when he got up, the car of his brother-in-law was gone (RT 189). He walked around the motel, etc., and went back to his room (RT 189). At 8:00 p.m. he went over to their room and spent the rest of the evening there (RT 190). They discussed the girls and the trouble with his, Dunlap's, car (RT 190).

Howard drove it (RT 193) and then he and Peak drove it to check it out (RT 193). Since the girls weren't there he was anxious to get back to school (RT 195, L 3-5). Dunlap described being stopped and admitted he was nervous, but he was nervous because he said Washington pulled a gun on him (RT 198). Washington, the case-in-chief, denied having drawn his gun (RT 132, L 15-20). Then Cameron put the gun to his head (RT 199), which Cameron did not (RT 166-167). Cameron described Dunlap as not being able to stay put, and when Cameron saw Dunlap lean into his car and put his hand on something shiny, Cameron drew his gun, but he didn't believe Dunlap saw it (RT 166-167).

Dunlap was surprised to see the sacks and had not seen them before (RT 200).

On cross-examination he testified the Triumph was registered to Steve Morris, his other brother-in-law (RT 204).



He denied that when he replaced his suitcases at the motel that the trunk was opened or closed by him (RT 206, L 7-22).

He did not know why his brother-in-law registered as Carl Anderson, Deming, New Mexico (see Government's exhibit 1, RT 207-208).

Peak's attorney then cross-examined Dunlap (RT 212-213). Dunlap was not aware that Peak would accompany his brother-in-law Howard to New Mexico (RT 212-213). Dunlap knew Howard was a member of the United States Olympic team (RT 213).

On re-direct he stated Howard registered under assumed names so he wouldn't be bothered by ticket hustlers, things of that nature (RT 214, L 6-17).

On re-cross examination by the Government, Dunlap admitted he had stated on cross-examination he didn't know why Howard registered as Anderson (RT 216).

Dunlap rested (RT 216, L 15), Peak then rested (RT 216, L 16-17).

The Government recalled Turner in rebuttal, who testified that he saw Dunlap close the trunk of the Triumph, Howard open the trunk and Peak remove the white object (RT 217-218). Dunlap stated on cross examination the bags he denied ever seeing before were quite visible (RT 210-211, L 8).

Washington denied asking Dunlap when he stopped him, "Where are the girls?" (RT 220, L 24 to 225, L 1). Washington denied asking, "What money do you have?" (RT 221 L 2-4).

Washington testified the Buick was parked at the motel the afternoon before while Dunlap was walking up and down; the Buick did not leave until one hour to one hour and a half

later (RT 222, L12 to 223, L 1) contrary to Dunlap's testimony that the Buick was gone (RT 189, L 10-11).

Cameron said only one car was on the highway when he and Washington stopped the Triumph and that was after the Triumph was stopped (RT 232, L 24-25), and the car that passed was the car that almost hit Washington (RT 234, L 13-15), as Washington had testified to (RT 133, L 7-8).

Anderson was recalled and testified that in the two surveillances he did, first with Howard there were a few cars on the street (RT 237, L 7-16), when he followed the Triumph to Crawford he saw only one other car (RT 236, L 16-22).

Dunlap took the stand on surrebuttal and the Government objected to materiality and was sustained (RT 238, L 23 to 239, L 4).

The Government waived argument and Peak and Dunlap's counsel argued (RT 240). The Court reserved ruling to 1:30 p.m. (RT 240). At 1:30 p.m. the Court made findings and found Dunlap guilty as charged in Counts I and II and Peak guilty as charged in Counts I and III.

#### IV. SUMMARY OF ARGUMENT

1. Peak and Howard having retained counsel for twelve months prior to trial, and having failed to bring a Motion to Suppress prior to trial, and having failed to show adequate grounds as to why they did not, had waived objections to the search and seizure; and if not waived there was probable cause for the search of the Triumph, and probable cause for the arrest of Peak and the Search of the Buick was a lawful search incident to arrest.

2. There was sufficient evidence to find Dunlap and Peak guilty.

## V. ARGUMENT

1. Peak and Howard having retained counsel for twelve months prior to trial, and having failed to bring a Motion to Suppress prior to trial and having failed to show adequate grounds as to why they did not, had waived objections to the search and seizure; and if not waived, there was probable cause for the search of the Triumph, and probable cause for the arrest of Peak and the search of the Buick was a lawful search incident to arrest.

When the Government offered the contraband, Government's exhibits 3, 7 and 8, into evidence, Dunlap's counsel and Peak's counsel objected (RT 149-152; 152-156).

The Court stated:

"THE COURT: Well, to begin with, here is a case where there is no motion. The case has been pending since—

"MISS DIAMOS: September 13th.

"THE COURT: — September, over a year. There has been no Motion to Suppress filed in the case in accordance with Rule 41. There has been nothing done to attack the search or the seizure up to this very minute when we are in the evidence as actually offered after all of the testimony regarding foundation is received. I strongly feel that under the cases, the objection to the evidence has been waived. This is certainly no open and shut case, as far as legality of the search is concerned. In fact, I am inclined to think, on considering the evidence — in fact, I find that the search and the seizure of the marijuana in the Triumph was a valid one. I think counsel sees with rose colored glasses here a little bit. In the first place, we must start with the proposition that Nogales, Arizona — and the Court can judically notice this because of the fact that it

has observed here in recent events, that about all the trial business the Court has is prosecution for endeavors to bring narcotics from Mexico into the United States at Nogales. In fact, Nogales — the Court judicially notices that is one of the leading, if not the leading foreign avenues for getting narcotics from Mexico into the United States. So we are not talking about the border up near Montreal or up near Washington, we are talking about Nogales, Arizona, with that being the facts as to the character of the narcotics traffic in the vicinity of Nogales. We do have, in the testimony, the fact that Mr. Peak and Mr. Howard are seen in the afternoon of August 30th at Nogales, Sonora, over in Mexico, in consultation with a known narcotics trafficker on that side of the border. That establishes a contact with narcotics, this contact with a known narcotics peddler. Mr. Dunlap is at the motel, as are Mr. Peak and Mr. Howard, but they avoid each other for a period of time, in fact up until after 8:00 o'clock in the evening; and then Mr. Dunlap begins to associate and to meet and to consort with Mr. Peak and Mr. Howard. Then begin the departures from the motel and coming back: Mr. Howard leaves about 10:00 o'clock in the Buick, he drives around Nogales to some extent, and at midnight Mr. Peak and Mr. Dunlap leave in the Triumph; they drive around Nogales a little while and they come back, and at 1:00 A.M. — the Triumph and the Buick get back almost simultaneously, they departed some time apart, but they come back almost together. At 1:30 then Mr. Peak and Mr. Howard go off and not in the Buick which they had originally, but they take Mr. Dunlap's automobile, which this is not an occasion of just a casual acquaintance of these people. You have got the occasion then, for sure, of being together in this association all through the night, you have got them using automobiles interchangeably. About 2:00 o'clock Peak and Howard come back with the Triumph — 2:00 o'clock in the morning. They come back with the Triumph, they take something out of it and he takes off away from Nogales. This coming and going has gone on ever since, and the association has gone on ever since they came back from being in Nogales with the nar-



cotics peddler. They leave and come back. But the point is, they registered in that motel on the 30th, and the agents had them under observation more or less from 9:00 o'clock in the morning or so, and they are seen separately and together, they are around the place, they are coming, they are going, and this keeps on through 8:00 to 10:00 to midnight to 2:00 o'clock. They register in the motel, and then all of a sudden, after all this nocturnal activity, Mr. Dunlap suddenly decides to leave the motel and takes off, which is conduct a little bit unusual with a person who registered for a motel in the morning and spends the day kicking around and takes off without ever using the room to sleep in. Another suspicious circumstance. These things are known to the agents, all of these things taken together collectively, and I believe that on the basis of what the agents knew, I find that the search and the seizure in the Triumph was made upon probable cause, that is that it was made upon a belief on the part of Mr. Cameron and Mr. Washington reasonably arising out of the circumstances that were known to them, that the Triumph contained contraband, which under the law was then subject to seizure and destruction. On that basis, that seizure and the arrest of Mr. Dunlap was lawful; and that when that information was transmitted as to the search and the seizure, and the result was transmitted to Mr. Anderson and Mr. Turner, and when Mr. Peak and Mr. Howard began to depart before a warrant could be obtained for a search of their room and a search of their vehicle, those officers had probable cause to arrest Mr. Peak and Mr. Howard as participants. And I think the whole area of conduct showed a cooperative effort of all these people all through the day and through the night, and the officers were justified in arresting Mr. Peak and Mr. Howard on the charges of conspiring to smuggle marijuana and smuggling marijuana into the United States; and therefore the search of the Buick and the seizure of the substance that has been identified as heroin were also lawful.

"MR. WORRELL: Would the Court permit any further discussion of the motion?

"THE COURT: Oh, yes." (RT 156, L 17 to 160, L 12).

Worrell argued and the Court pointed out the evidence (RT 160-164).

The Court found:

"THE COURT: Well, the failure of the officers to just get right on them and stay with them every minute—you say they broke off the surveillance and just followed them part way. At that hour in Nogales and with people engaged in that business, they didn't dare identify themselves as being in close pursuit, but very definitely when there is this maneuvering and then in the middle of the wee hours of the morning after the cars have come and gone, the Buick and the Triumph, and then back together, and then the Triumph again with a different driver; when they come back, and in fifteen minutes Mr. Dunlap is in the car and he is headed north, I think the officers are more or less justified in believing, in view of that, that that strange conduct at that hour of the morning, that probably the merchandise is there." (RT 164, L 12-25).

As was stated in *Sandez vs. United States* (9th Cir., 1956) 239 F.2d 239 at page 242:

"[3] Further, had there been any *question of illegal search, the obligation was upon the defendant to move to suppress the evidence after indictment.* *Weeks vs. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652. *Price vs. Johnston*, 9 Cir., 125 F.2d 806, certiorari denied 316 U.S. 677, 62 S.Ct. 1106, 86 L.Ed. 1750.

*"Failing to make such a motion, he has waived his objection,* *Segurola vs. United States*, 275 U.S. 106, 48 S.Ct. 77, 72 L.Ed. 186, *unless there exist extenuating circumstances,* *Agnello vs. United States*, 296 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145." (emphasis supplied).

Also, as was stated in *Santoro vs. United States* (9th Cir., 1967) 388 F.2d 113 at page 114:



"Appellant contends that Government Exhibits 7, 8, 9 and 10 were erroneously admitted into evidence. Appellant argues that the items were seized pursuant to an arrest which was unlawful because made without a warrant and without probable cause. No motion to suppress within Rule 41 (e), Fed. R. Crim. P. was made prior to trial; and the government contends that appellant's motion to strike was inadequate. The facts of this case, however, make it unnecessary to decide the question of the legality of the arrest."

As was stated in *Bell vs. United States* (9th Cir., 1967) 382 F.2d 985 at page 986 to 987.

". . . Prior to the trial, there had been no motion to suppress evidence as required by Rule 41(e), Federal Rules of Criminal Procedure. Although some may believe that judges ought to be endowed with prescient powers, none has yet suggested that they must be mind readers.

"Moreover, assuming that the obscure request should have been treated as a motion to suppress, there was nothing in Officer Goetzke's testimony which should have been suppressed. Essentially, he testified to nothing more than that he stopped the automobile and observed the appellant therein. *If there is a question as to whether or not there existed probable cause for the stopping of the automobile, it was impliedly resolved in favor of the Government. . .*" (emphasis supplied.)

See also *United States vs. Paradise* (3rd Cir., 1964) 334 F.2d 748, where that Circuit held denial of motion to suppress made at trial was proper exercise of discretion when defendant had been represented by counsel fourteen months prior to trial.

The Court, however, in finding Dunlap and Peak had waived, did make findings that there was probable cause to stop and search the Triumph.

Title 19, U.S.C. §482, provides:

"Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast,

or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, *in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law*; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial. R.S. § 3061.” (emphasis supplied).

In *Bailey vs. United States* (5th Cir., 1967) 386 F.2d 1 at pages 2-3, the Fifth Circuit held:

“As this was a warrantless search not incident to an arrest, the government either must have a finding that probable cause existed or must excuse its absence by resort to the border search doctrine. No case has held that one who has not crossed an international boundary can be the object of a constitutionally permissible border search, and we do not reach that question. Rather, we assume the view of the searching officers, and hold that ‘the fact and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief’ that appellants were, when searched, possessed of illegal narcotics.”

Thereafter, when Washington and Cameron were with the Commissioner, getting arrest warrants and a search warrant, Howard and Peak attempted to leave and Anderson and Turner stopped them and arrested them for conspiracy to smuggle marijuana.

Furthermore, as was stated by Government’s counsel in

resting on the Government's case in chief:

"MISS DIAMOS: I have nothing further, Your Honor, and the Government rests.

"In resting, I would like to point out, for the record, that regardless of what Mr. Worrell might have thought how this case might have begun, if a motion had been filed the Government would have probably had to produce more facts, which would be in our case in chief, and I would just like to state that for the record.

"MR. WORRELL: Your Honor, I feel that is an improper statement for the record. With all due deference and respect to Miss Diamos, the Court has ruled on a motion, and I think a deliberate attempt to tell the Court that she had additional facts that she could have brought, because the Court has ruled against us and there is no reason for her to say that she's got more evidence.

"THE COURT: Mr. Worrell, I think it may be in order, the rule applies that a person complaining of an unlawful search and seizure may move the District Court, in the District in which the property was seized, for the return of the property and move for suppression of the evidence on the ground, 1, that the property was illegally seized without warrant or, 2, the warrant is insufficient on its face or, 3, the property seized is not that described in the warrant or that there was not probable cause for believing the existence of the grounds on which the warrant was issued; and 5, the warrant was illegally executed. Of course, the first grounds would not be pertinent here.

"The Judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the

Court in its discretion may entertain the motion at the trial or hearing.' I believe that in the light of the rule, the motion should have been made before trial or there should have been advice given to the Court and of course the United States Attorney, and leave should have been asked to have the motion made on the trial. And in the absence of the motion or notice that the motion was to be made on the trial, *I think the Government has the right to rely on the fact that there was going to be no motion, and the evidence which might have been produced on suppression, that there was probable cause and reasonable grounds that some of that would not be brought here today on the question of guilt or innocence.*

*"The failure to get leave or make the motion affected the Government's showing."* (emphasis supplied). (RT 168, L 22 to 170, L 20).

"The Government was stopped from going into the conversations of the agents (RT 15, L9-10). The Government, on a hearing of a motion to suppress could have shown what Turner and the agents knew about the taxi stand that Howard and Peak parked by and were then seen talking to one of its drivers (RT 16) and the man in whose car they were sitting near the bull ring, Roberto Sanchez (RT, i.e., Sanchez owned that taxi service). Further, that when Turner checked the registration on the Buick the Government could have shown it was a rented car (RT 15, L 1-2). As was shown when Turner checked the Triumph registration it was not registered in the name of Dunlap (RT 76, L 2-3). Further, that the area of Nogales Howard headed into and then Dunlap and Peak headed into are known drop points along the Internal Boundary, i.e., that contraband is picked up through holes along the fence near Crawford Street, et cetera.

It is respectfully submitted there was a waiver to the objections, if any, of the search and seizure by both Dunlap and Peak.



## **2. There was sufficient evidence to find Dunlap and Peak guilty.**

Peak did not rest until after Dunlap testified (RT 216) and did cross-examine Dunlap (RT 212).

As the Court found:

“AFTERNOON SESSION

“1:30 O’CLOCK P.M.

“THE COURT: In the case of the defendants Edwin Walter Dunlap and Carlton Cozzette Peak, the Court find both defendants guilty as charged in Count 1, the conspiracy count; finds the defendant Edwin Walter Dunlap guilty as charged in Count 2 of the Indictment, and finds the defendant Carlton Cozzette Peak guilty as charged in Count 3 of the Indictment.

“I think I should say, in the light of the testimony of Mr. Dunlap, that that evidence — his evidence more or less strengthened the Court’s finding of guilt in the case. I simply find the explanation beyond belief. In other words, these people are down at Nogales, they don’t live there, they don’t have any interest there except they are going to meet some girls. What girls? We are given that, just that statement: Some girls were going to come. No explanation whatever about who, what girls. The girls never come, there are no girls. They are there from the morning on the 30th until the wee small hours of August 31st; and, on the basis of the testimony, the Triumph has some mechanical difficulty with it, which the defendants — in the first place, it’s not Mr. Dunlap’s automobile. It is, according to the defendants, registered to a man named Phillips — one says it’s either the emergency brake or the transmission, could be the emergency brake, but anyway at midnight Mr. Peak and Mr. Dunlap go out and try the car out for mechanical difficulty, which they are gone an hour, which just, at that hour of the night, doesn’t make much sense. Then, when they return at about 1:30, then Mr. Peak and Mr. Howard go out and try it out without Mr. Dunlap who is the one who is interested in the car and

what someone else may think of it, but then Mr. Peak and Mr. Howard go out and try it out. They get back at 2:15. Mr. Dunlap decides not to wait and have it fixed, if there be anything the matter with the car, but without waiting, he takes off at that hour of the morning headed back to school; all of a sudden he is in a great hurry. No explanation of why the girls didn't show or whether or not they were supposed to be there. It's too nebulous, and actually strengthens the Government's case, in my belief." (RT 241, L 1 to 242, L 16).

Dunlap in arguing the sufficiency of the evidence cites *Miller vs. United States* (9th Cir., 1967) 382 F.2d 583, for the point there was no knowledge shown on Joseph's part by the Government.

Evidence on appeal shall be construed in the light most favorable to the Government. *Thrasher vs. United States* (9th Cir., 1968) 394 F.2d 506 at 507.

Dunlap denied ever looking into the trunk of the Triumph or closing it, although he did admit the burlap bags were readily visible. Turner saw him close it. There was evidence from which the Court could find knowledge. Furthermore, the Court found his story "beyond belief" (RT 241, L 13).

With regard to Peak's argument, Peak argues that at no time did Anderson or Turner testify that Government's exhibit 3, the heroin, was in the Pan American flight bag found on the side Peak was seated (page 8 of Peak's opening Brief). Peak overlooks the testimony of Anderson, page 97 of the Transcript of Testimony, lines 1 through 20.

Peak's case included Dunlap's defense. Dunlap brought out conversations about Peak being in Nogales because he had to see his wife in Tucson, and Peak drove first with Dunlap and then with Howard to test the car, but which the Court found, were trips to the drop point by the fence to pick up the marijuana and heroin which was finally done by Howard and



Peak. Peak took the white object out of the trunk of the Triumph and entered the motel room. Government's exhibit 3 was found wrapped in a white towel.

As was stated in *Mott vs. United States* (9th Cir., 1967) 387 F.2d 610, at page 612:

"[1-3] Conspiracy may be and, frequently is, proved by circumstantial evidence. It can rarely be proved in any other manner. *Diaz-Rosendo vs. United States*, 357 F.2d 129 (9th Cir. 1966) (en banc); *Isaacs vs. United States*, 301 F.2d 706 (8th Cir. 1962). In determining whether or not the evidence is sufficient to sustain the judgment of conviction we must view the evidence in the light most favorable to the prosecution. *Glasser vs. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Diaz-Rosendo vs. United States*, supra. Viewing the evidence in this light we find that there was sufficient evidence, direct and circumstantial, to support the conviction."

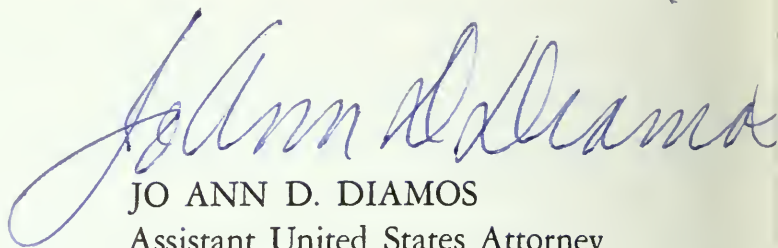
The trip in the Triumph with Howard, the explanation he is in Nogales, Arizona, to see his wife in Tucson, the removing of the "white object" from the Triumph by Peak is, it is respectfully submitted, direct and circumstantial evidence of his knowing participation in the conspiracy.

## VI. CONCLUSION

It is respectfully submitted Dunlap and Peak had waived their objections to the search and seizure and that there was sufficient evidence to find them guilty as charged.

Respectfully submitted,

EDWARD E. DAVIS  
United States Attorney  
For the District of Arizona



JO ANN D. DIAMOS

Assistant United States Attorney

Attorneys for Appellee

Three copies each of Brief for Appellee mailed this 3rd  
day of September, 1968, to:

SIDNEY BRADPIECE

280 South Beverly Drive, No. 311

Beverly Hills, California 90212

Attorney for Appellant Peak

CLAUDE VIBART WORRELL, SR.

Suite 300, Bank of Finance Building

2651 South Western Avenue

Los Angeles, California 90018

Attorney for Appellant Dunlap